

REMARKS / ARGUMENTS

The present application includes pending claims 1-32. Claims 1-10 and 21-32 have been allowed. Claim 11 has been rejected. Claims 12-20 were objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form. The Applicant respectfully submits that the claims define patentable subject matter.

Claim 11 is rejected under 35 U.S.C. § 101 because the claim is allegedly directed to a non-statutory subject matter. The Applicant respectfully traverses this rejection at least for the reasons previously set forth during prosecution and at least based on the following remarks.

REJECTION UNDER 35 U.S.C. § 101

The Applicant turns to the rejection of claim 11 under 35 U.S.C. § 101. The Final Office Action states the following:

Claim 11 is rejected under 35 U.S.C. 101 because the claimed inventions are directed to non-statutory subject matter. As noted below, claim 11 is directed to neither a "process" nor an "apparatus," but rather embrace and overlap two different statutory classes of invention set forth in 35 U.S.C. 101, which is drafted so as to set requirements for the statutory classes of invention in the alternative only. See, Ex Parte Lyell, 17 USPQ2d 1548 (Bd. Pat. App. & Inter. 1990). See also, MPEP 2173.05(p).

See the Final Office Action at page 3. The Applicant respectfully disagrees. The Examiner is referred to the following citation from the Manual of Patent Examining Procedure, 8th Edition, Revision 5, August 2006 (MPEP):

Descriptive material can be characterized as either “functional descriptive material” or “nonfunctional descriptive material.” In this context, **“functional descriptive material” consists of data structures and computer programs which impart functionality when employed as a computer component.** (The definition of “data structure” is “a physical or logical relationship among data elements, designed to support specific data manipulation functions.” The New IEEE Standard Dictionary of Electrical and Electronics Terms 308 (5th ed. 1993).) **“Nonfunctional descriptive material” includes but is not limited to music, literary works, and a compilation or mere arrangement of data.**

See the MPEP, Chapter 2106.01. The Applicant points out that the descriptive material in the preamble of claim 11 is not related to “music, literary works, and a compilation or mere arrangement of data.” Instead, the Applicant points out that the descriptive material in the preamble of claim 11 is related to “computer programs which impart functionality when employed as a computer component.” In other words, **the material in the preamble of claim 11 is “functional descriptive material,”** as per the above MPEP citation. The Examiner is also referred to the following MPEP citation for support:

When functional descriptive material is recorded on some computer-readable medium, it becomes structurally and functionally interrelated to the medium and will be statutory in

most cases since use of technology permits the function of the descriptive material to be realized. Compare *In re Lowry*, 32 F.3d 1579, 1583-84, 32 USPQ2d 1031, 1035 (Fed. Cir. 1994)

See id. The Applicant points out that claims 11-20 recite a “computer-readable medium”, which is the phraseology used in the above MPEP analysis. The Applicant, therefore, submits that the material in the preamble of claim 11 is functional descriptive material, which is also statutory, as per the above MPEP guidelines. The Applicant submits that claims 11-20 are, therefore, directed to statutory subject matter, and that the rejection of claim 11 under 35 U.S.C. § 101 should be withdrawn.

CONCLUSION

Based on at least the foregoing, the Applicant believes that all claims 1-32 are in condition for allowance. If the Examiner disagrees, the Applicant respectfully requests a telephone interview, and requests that the Examiner telephone the undersigned Attorney at (312) 775-8176.

The Commissioner is hereby authorized to charge any additional fees or credit any overpayment to the deposit account of McAndrews, Held & Malloy, Ltd., Account No. 13-0017.

A Notice of Allowability is courteously solicited.

Respectfully submitted,

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